UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, ST. LOUIS

LORI J. LYNN, ET AL.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:15-cv-00916-AGF
	)	
PEABODY ENERGY CORP., ET AL.,	)	
	)	
Defendant.	)	

ORAL ARGUMENT

BEFORE THE HONORABLE AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

NOVEMBER 17, 2016

APPEARANCES:

For Plaintiff:
Edward W. Ciolko
Mark K. Gyandoh
KESSLER AND TOPAZ
280 King of Prussia Rd.
Radnor, PA 19087

Don R. Lolli
DYSART AND TAYLOR
4420 Madison Ave., Ste. 200
Kansas City, MO 64111

For Defendant:
David Tetrick, Jr.
KING AND SPALDING, LLP
1180 Peachtree St., N.E.
Atlanta, GA 30309

Sheena R. Hamilton
DOWD BENNETT, LLP
7733 Forsyth Blvd., Ste. 1900
Clayton, MO 63105

REPORTED BY: PATTI DUNN WECKE, RMR, CRR, CMRS
Official Court Reporter
United States District Court
111 S. Tenth Street
St. Louis, MO 63102
314-244-7984

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

(THE FOLLOWING PROCEEDINGS WERE HAD ON NOVEMBER 17, 2016, AT 9:38 A.M., IN OPEN COURT:)

THE COURT: We are here in the matter of Lori Lynn v. Peabody Energy Corporation et al. Case number 4:15CV916-AGF. This matter has been scheduled before the Court today for oral argument on the defendant's motion to dismiss, which I think is docket number 83. And the parties have fully briefed the motion. I have reviewed the parties' briefs, and I granted the request for oral argument with respect to this matter. I'd like to have counsel who will be arguing here today please come forward and state their appearance. So on behalf of the defendant who will be arguing here today?

MR. TETRICK: Good morning. I'm David Tetrick from King and Spalding. I'll be arguing on behalf of the defendants this morning.

THE COURT: Okay. Thank you.

MR. CIOLKO: Good morning, Your Honor. This is Ed Ciolko from Kessler, Topaz, Meltzer and Check, arguing for the plaintiffs.

THE COURT: Thank you. And obviously there are other counsel here at counsel table today. I just want to tell you all that I've allotted slightly more than an hour for this so that you all should keep that in mind as we are proceeding here. We will of course begin with the

defendants. And I will permit the defendants some brief reply time as well, but I think you all should kind of assume you've got about 20 to 25 minutes to argue with the notion that I'm going to ask you some questions that are going to derail what you plan to say a little bit at times, so we'll feed in a little extra time for that. Does that work for everyone?

MR. CIOLKO: Yes.

MR. TETRICK: Yes.

THE COURT: All right. Anything that we need to take up prior to argument?

MR. TETRICK: No, Your Honor.

THE COURT: Good. As I said, I do want you all to know that I have reviewed the briefs that the parties filed in this matter. I don't purport to have reviewed every case that was cited in all of those briefs, but obviously we have more work that we will do with respect to this matter after your argument here today. So you may proceed.

MR. TETRICK: Good morning, and may it please the Court. My name is David Tetrick and I represent the defendants in this case. Your Honor, we filed this motion to dismiss chiefly because the plaintiffs' second amended complaint fails to state an ERISA claim under the demanding requirements that the Supreme Court announced in 2014 in

it's Fifth Third v. Dudenhoeffer case.

COURT REPORTER: I'm sorry, I couldn't hear that.

THE COURT: Fifth Third, F-I-F-T-H T-H-I-R-D. And if I could get you to speak up a little bit I think that would help.

MR. TETRICK: Yes, Your Honor. I'm getting over a cold and I can't quite hear myself yet. I want to make sure that I'm not yelling at the Court.

THE COURT: This is good.

MR. TETRICK: I will refer to this case as Dudenhoeffer to make it slightly easier than Fifth Third. But in Dudenhoeffer, as we set forth in the briefing, the Supreme Court articulated two distinct types of tests for these ERISA company stocks or stock drop cases like the one that brings us before the Court today. And the Supreme Court set this up under Rule 12. It is a motion to dismiss argument. And it tests the pleadings. It tests the claims that a fiduciary should have known from public information that a particular investment in a 401(k) plan was a imprudent investment by one standard; it tests a claim that a defendant should have known based upon inside information that the investment was an imprudent one based on a different standard.

THE COURT: Now, I don't get the sense from the

review of the plaintiffs' memorandum here that they believe that those two must be distinct. I understand that those two claims were analyzed separately by the Supreme Court, but on what do you rely for the proposition that they must be distinct and that there cannot be a combination of public and nonpublic to support a claim?

MR. TETRICK: I would point to two things, Your Honor. The first being that in the underlying Dudenhoeffer case that the Supreme Court agreed to review, the two claims existed, but nevertheless the Supreme Court pulled them apart and announced very different standards to review those two claims. I would also point the Court to the Fifth Circuit's recent case in BP, PLC, versus Whitley case, or Whitley versus BP, PLC, where the Fifth Circuit said that it was improper to conflate the two. And finally, I would refer the Court to the Radio Shack decision that came out about 45 days ago out of the Western District of Texas that also said that the two claims cannot be conflated the way that the second amended complaint in this case attempts to do so.

So turning to the public information claim first, Your Honor, which is contained in both Counts One and two. And the bulk of the complaint is devoted to the public information claim which is not altogether surprising because as we'll speak about when we get to the nonpublic

information claim, the basis of the nonpublic information claim is a press release by the New York Attorney General that occurred in November 2015. This case was originally filed in June 2015 as a straightforward public information claim. Therefore, it is not surprising at all that the overwhelming majority of the allegations in the complaint are based on public information. And the complaint spends a significant amount of time describing how the price of Peabody Energy Corporation's publicly traded stock was on a steady decline from the beginning of the class period, which is December 2012, all the way through the date that the complaint was filed. And the plaintiffs include even at paragraph 287 of the complaint a chart that demonstrates the steady decline of Peabody stock over that period. And the thrust of the complaint is that based upon all of the bad news both for the coal industry on a worldwide basis and how Peabody was affected by the headwinds within the coal industry, that anybody looking at the public information available would have determined that this was an imprudent investment. That's the thrust of the complaint.

The problem with those sets of allegations is that the Supreme Court in Dudenhoeffer was so skeptical of a public information claim even being available under ERISA, and that is why in the Dudenhoeffer case the Supreme

Court set forth a standard that said that claims -- that a fiduciary should have read the publicly available information and determined to divest the retirement plan of company stock are implausible as a general rule. The Court did leave open the possibility that special circumstances might exist that would make such claims plausible, but the Court declined to define what those special circumstances were instead leaving it for the lower courts to determine what those special circumstances might be.

THE COURT: And what do you believe, based upon the case law that has developed since that time, might constitute special circumstances?

MR. TETRICK: I know this much, Your Honor, I know that what is alleged in the second amended complaint has not been found to be enough except in one case that the plaintiffs cite in their brief. The majority of the cases out there, the overwhelming majority have found that the types of things that are alleged in this complaint are simply not enough. But to answer the Court's question as to what would be enough in a case where Dudenhoeffer was faithfully applied, I think that you can look to some of the pre-Dudenhoeffer cases, take it back to the early 2000s where these cases first started gaining momentum and those were within the Enron case and within the Worldcom case and some of the early 2000 corporate scandals where

corporations that seemingly were very healthy melted down virtually overnight. And in those cases, what they had in common and what a special circumstance might be would be accounting fraud, restatement of their financials, something that would make the market look at the value of the stock and say we had this entirely wrong, the public information was entirely wrong.

In the Eleventh Circuit's case involving Delta Airlines, Smith versus Delta Airlines case that we cited in our brief, that case had been filed in the early 2000s, I believe it was 2004. And in that case when it eventually reached the Eleventh Circuit, the Eleventh Circuit recognized that accounting irregularities, financial statement fraud, those types of sudden events that cause you to doubt all of the public information that's out there, that's the type of special circumstances that the Supreme Court meant in Dudenhoeffer. And to be clear, since that time line might have been a little jumbled, the original Smith versus Delta Airlines case was filed in 2004. And I will take some suspense out of the room by telling you that my colleagues on plaintiffs' side know that case very well. They were counsel of record in that case. But even though it was filed in 2004, the Eleventh Circuit opinion that I'm speaking of was in 2015, that is after Dudenhoeffer had come out, and it had to wrestle with

the Dudenhoeffer standard as apply to events that had occurred before Dudenhoeffer took place.

So, that's what I would look to for special circumstances, and when I look in this complaint here I don't see anything along those lines, something that would make you doubt what is out there publicly.

The plaintiffs set forth four special circumstances in the second amended complaint. The first one is that based on the nonpublic information that the fiduciaries knew or had access to special circumstances existed here. That conflates the Dudenhoeffer analysis, which says that the fiduciaries as a normal course of things are entitled to rely on things that are publicly available.

The remaining -- I should say, the second and third thing that the second amended complaint points to as a special circumstances is in reverse order, the debt level of the company and the Z-score of the company, which is a financial engine that professionals use if they're trying to determine the likelihood of a bankruptcy filing. Both of those things as we pointed out in our brief, are publicly available. The debt certainly is, that can be found in financial statements. And the Z-score itself is just another way of slicing up the publicly available information.

The fourth and final special circumstance that the plaintiffs point to is the failure to investigate; that is, that these fiduciaries allegedly did nothing in the face of all of this public information that painted such a dim picture of the prospects for the entire industry, let alone Peabody stock. The issue there is that it goes to the Dudenhoeffer requirement that the special circumstance must have something that impacts the reliability of the markets valuation of the stock. A Fiduciaries' failure to investigate even if true, would not move the needle because presumably there would not be a public disclosure saying our fiduciaries have failed to investigate, therefore the market would not react to that failure to investigate.

So for all of these reasons, we think that the Dudenhoeffer special circumstances test is not applicable here because none of the special circumstances that the plaintiffs have alleged would have affected reliability of the stock, and therefore the default rule of Dudenhoeffer, that is claims based on public information of the type that are before the Court today are implausible as a general rule.

And unless the Court has additional questions about that?

THE COURT: I do. So is there a time when the economic circumstances of a company become so dire that it

becomes an imprudent investment, notwithstanding the -- I mean, putting aside any claim that the stock itself, the price is inflated or, you know, the risk has not been properly assessed by the market. So looking to the language in Kodak, looking to some of the early language in the opinion in Dudenhoeffer, doesn't the Court assume that even under the stringent rule that they were examining for fiduciaries that there could be a situation where the economic circumstances got so dire that it would be an imprudent investment?

MR. TETRICK: I think that in Dudenhoeffer they describe that as being between a rock and a hard place because there is also a cause of action available under ERISA for selling out of a stock that is within a 401(k) plan and then when the stock rebounds then the fiduciaries could be sued for imprudently getting rid of the stock.

THE COURT: But wasn't the Supreme Court talking about that rock and a hard place in the context of whether to continue to adopt this differential standard, and it rejected that?

MR. TETRICK: No argument, Your Honor, that the Court rejected the presumption of prudence.

THE COURT: Right. And I'm just looking at the language, you know, before they are analyzing and rejecting each of the arguments that were made to try and continue

the presumption, the Court says the proposed presumption makes it impossible for a plaintiff to state a duty of prudence claim no matter how meritorious unless the employer is in very bad economic circumstances. Now, that language suggests to me that one can get to a point where the economic circumstances are so dire that it would be imprudent for the fiduciaries to continue to purchase the stock even though the market information might be correct.

MR. TETRICK: I read Dudenhoeffer a little bit differently, Your Honor, respectfully. I read that as commentary on the -- the Court's commentary on the problems with the presumption of prudence and the way that it had grown up; that is, in trying to apply this presumption of prudence the courts of appeal that had taken this up had all come up with slightly different variations on the theme that fiduciaries within an ESOP, a plan that is designed to hold nothing but employer stocks, were entitled to hold on to that employer stock absent dire economic circumstances. And I think that the Supreme Court's commentary was that that presumption of prudence and that dire economic circumstances was wholly at odds with what the statute actually says.

The statute actually says that there are delineated fiduciary duties and that the Supreme Court

ultimately came down and said those statutory fiduciary duties they apply to all investments. So I don't read that as a license to make an allegation like the ones that we have here that, yeah, eventually you just had to know that the stock had reached such a place.

THE COURT: So even on the eve of bankruptcy?

MR. TETRICK: Even on the eve of bankruptcy, I don't think that a claim exists under Dudenhoeffer, and I don't think that the second amended complaint here makes out a claim under Dudenhoeffer. The special circumstances test is supposed to be difficult, and I think it is because the Supreme Court had severe doubts as to whether a claim like this even exists under ERISA, but it left it to the very capable members of the ERISA plaintiffs bar to make out allegations nevertheless that might show the Court that these types of claims, which are implausible as a general rule, might nevertheless survive.

Our point is, there's just not enough here. We are different from Kodak. When I say "we" Peabody Energy Corporation who either employed my clients or still employs my clients. Kodak was a company that I think the autopsy result is that it's a company that failed to react to changes in the marketplace, changes in technology, et cetera, whereas Peabody Energy Corporation, notwithstanding its current status as a Chapter 11 debtor, is still in a

going business. Coal has taken a beating over the last several years for sure. Nevertheless, it still accounts for a significant amount of the energy that is consumed across the planet. And Peabody is in the course of putting together a plan of reorganization that will take advantage of the demand that is still out there. There still is a demand for coal in a way that there is very little demand for the Polaroid pictures that I loved so much when I was a kid.

THE COURT: So talk to me about the New York Attorney General's report.

MR. TETRICK: So, on November 9, 2015, the New York Attorney General issued a press release. Peabody issued a press release on the same day. And in the New York Attorney General's press release what he said, what General Schneiderman said was that he had determined based on an investigation that Peabody Energy Corporation had violated New York laws prohibiting false and misleading conduct in the company's statements to the public as investors. And the plaintiffs begin and end their claims about this, which begin at paragraph 281 and conclude at paragraph 307 of the second amended complaint by referring to this press release on November 9. And they say this is what makes up the material nonpublic information that underpins their nonpublic information claim. We then have

to take that nonpublic information existence of that nonpublic information and run it through the separate test that the Supreme Court set fourth in Dudenhoeffer.

And as we said in the briefs, as a fundamental issue there is an Iqbal and Twombly problem with this claim; that is, it is plainly contradictory to the other allegations in the complaint, the majority of the allegations in the complaint, among them being that during the entire class period the company's financial condition when viewed through the lens of objective financial metrics plainly indicates the company's deterioration over the last several years. In fact, the complaint is chocked full of bad news that the company had disclosed in October of 2015. The complaint even says that on November 9, the same day the press release came out, that Peabody was rated as one of the worse dividend stocks; meaning, that it is implausible and contradictory to the rest of the complaint that this information when disclosed to the market had any impact whatsoever. In fact, as we pointed out, the company stock actually rose on the day of the press release. The press release went out in the morning, the company stock closed higher than it had the previous Friday's closing price. As we also conceded, the price did go down slightly over the coming weeks.

THE COURT: But let's assume for a moment that

we've got what would be a line like this of declining price (demonstrating). Is it implausible that when we get to this day and some nonpublic information is disclosed that the stock changes and maybe it would have been, you know, maybe it would have gone a little bit like this, or maybe then the angle turns slightly steeper (demonstrating). How can I assess that on a motion to dismiss? It seems as though you are asserting to me that I can determine just on the face of the pleadings and the public information that's available about the stock price, that that disclosure had no material impact on the price of the stock. How can I decide that on a motion to dismiss?

MR. TETRICK: Your Honor, I think it's theoretically possible that the facts as you just described them might result in a different outcome; that is, a 45 degree downward slope, a disclosure of negative previously nonpublic information that then results in the 45 degree slope turning into --

THE COURT: Forty-six or a forty-eight.

MR. TETRICK: Sixty or sixty-five, whatever the case may be. If that were the case here, we would not have even suggested to the Court that it could take up this issue under Rule 12. Here however, the plaintiffs' own second amended complaint provides the very chart that you're speaking about, and it shows that there is almost no

difference within the price of the stock period after this disclosure. And the Eighth Circuit does not prohibit the Court from taking up materiality on a motion to dismiss. It allowed it in Braden v. Wal-Mart case so long as no reasonable jury could disagrees about the materiality. And we think that by making such a forceful case within the second amended complaint, including the charts and graphs that plaintiffs have so helpfully provided, that they have pled themselves out of that issue.

We would, however, nevertheless like the Court to go on to the Dudenhoeffer analysis with regard to the nonpublic information even if it were to agree with us that it could find these claims implausible simply based on the face of the complaint. We would still prefer that Court turn to the Dudenhoeffer analysis because we think that's where the weakness in these New York Attorney General claims are unquestionably brought to fore. When you take the Dudenhoeffer analysis and you apply it, the two pieces; that is, if you assume that these fiduciaries were in possession of the same negative material information that the complaint alleges was revealed on November 9, 2015, if you assume that they're in position of that, the question under Dudenhoeffer is what should they have done. And Dudenhoeffer is clear that there's a two-part test for them. When I say "them" I mean the plaintiffs. They have

to make allegations that there is something that the fiduciaries could have done that, first, wouldn't have violated the securities laws; and second, is something that a prudent fiduciary would not have concluded was more likely to do more harm than good. In this case, the Plaintiffs simply have not made out those allegations. They have attempted to make out those allegations but have simply failed.

THE COURT: Well, but haven't they alleged that those actions would have been something like was done later, the appointment of an independent fiduciary who might then make the decision to hold off on further purchases of the company stock until such time as the market would digest and take into account that information?

MR. TETRICK: They have alleged that an independent fiduciary was hired in -- well, an independent fiduciary in February of 2016 decided to divest the plan of company stock. That doesn't address, however, what these fiduciaries should have done in December of 2012, or the period thereafter. And it certainly cannot be the case that any allegation that, well, you could have hired an independent fiduciary is enough to get over Rule 12 under Dudenhoeffer, because afterall, any fiduciary of any retirement plan can always choose to hire an independent fiduciary, but that's not required. ERISA has this tension

within it where it allows employees of the employer who sponsors the plan to act as a fiduciary in house. And so Dudenhoeffer cannot be read to require that an independent fiduciary be hired each time things get rocky, otherwise there'd be no point in having these fiduciaries to begin with. They are there for some of the more beneficial reasons, that is the in-house fiduciaries.

THE COURT: So if you had to fix the time period when this material nonpublic information with respect to the New York Attorney General was possessed by the fiduciaries, when would that be?

MR. TETRICK: I think the Court has to assume from the very beginning of the class period because that's what the complaint says, which is why I fix on 2012 and forward when the stock was at a much higher place than it was even when the independent fiduciary was hired.

Your Honor, I think it's worth pointing out that the plaintiffs' articulation of Dudenhoeffer is quite different than one that I have just told you the Court should apply. And they set forth in their opposition brief that Dudenhoeffer means that another fiduciary could conclude that their alternative actions would have -- would not have done more harm than good. I think that that's lowering the bar here and the Fifth Circuit happens to agree with me in Whitley versus BP. And I would ask the

Court to take a look at the Fifth Circuit's articulation of what Dudenhoeffer meant with the benefit of another case that the Supreme Court decided after Dudenhoeffer, the Amgen case. And the Fifth Circuit does a very nice job of pulling those things together. And it wrote that under the Supreme Court's formulation the plaintiff bears the significant burden of proposing alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than help it.

Here are two things that plaintiff say meet that standard. One is that our fiduciaries should have begun directing all of the contributions both from employer and the employee that were designated to go to the employer stock fund, the fiduciary should have changed that and started sending them to cash instead, presumably without telling anybody notwithstanding what the direction of these participants was with regard to how they wanted their money invested. Presumably these fiduciaries should have instead diverted the money to a cash fund.

And the second is freezing the fund altogether. The problem with the first is that it is a -- it creates a problem with regard to the relationship between the fiduciaries and the participants if that is not disclosed; that is, we are not following your directions, we are going

to move things that you want to go into employer stock into cash. You have to disclose that. The securities law say you can't just disclose it to the participants because it's a publicly traded stock, so you'd have to disclose this to the market. Of course, ERISA fiduciaries do not have the type of access to disclosures to the markets. ERISA fiduciaries are not in business of filing 8(k)s on behalf of their employer sponsor for example. There are 80 plus years worth of regulations and case law built up around when and how you disclose things like that.

So that would have required going through the securities function. It would have required a disclosure to the market. And before the participants could have caught up as the Fifth Circuit pointed out in Whitley, it's more likely than not -- a reasonable fiduciary could conclude that it's more likely than not that the fiduciaries would have looked at that and said that's going to hurt our people more than it's going to help them if the market reacts poorly before they can move. And it would be before they could move, because as the SEC has pointed out in the briefs that the plaintiffs attached to their opposition brief, it is not lawful to simply freeze contributions. You can't just stop buying stock that a participant wants you to buy, you also have to stop selling stock as well until such point as you disclose that to the

market. And the SEC confirmed in that brief what we said in our brief which is once you get into that regime of freezing a employer stock fund, you have to go through the disclosure requirements, you have to go through the black out requirements, and you'd put your participants in a situation where everybody else in the market knew that a group of employees had decided that the employer stock fund was no longer prudent because the SEC regime requires that you explain why you've taken this conduct at a time when the participants couldn't do anything about it. The Fifth Circuit says that that is simply not enough to overcome Dudenhoeffer.

So, looking at our second amended complaint there is just not enough here to reach that high standard that the plaintiffs are required to clearly articulate in the words of the Fifth Circuit, and we would ask that the Court apply that same standard.

THE COURT: Thank you.

MR. TETRICK: Thank you, Your Honor.

THE COURT: Hear from the plaintiffs.

MR. CIOLKO: Good morning again, Your Honor, if it please the Court.

THE COURT: Good morning.

MR. CIOLKO: My friend, Mr. Tetrick, is in excellent order. I also have a cold, so I'm going to ask

for the benevolence of the courtroom court reporter. I also tend to speak quickly --

THE COURT: Well, we'll stop you if you start doing that.

MR. CIOLKO: Thank you. So if I'm speaking deliberately it's not because I'm confused, it's because I'm trying to learn lessons my wife is teaching me.

First thing I'll say is, Your Honor, your analysis of Dudenhoeffer and the point that you made is spot on and are ones that we made in not just the Kodak case, but in other cases such as LandAmerica, in a couple of cases that we haven't done ourselves, the Braden case in front of your court. But the essential point was, Your Honor said, okay, Dudenhoeffer's main job was to look at this presumption of prudence that had become stricter and stricter and stricter. And as your court noted, how could it be that only the worse possible situation, the most dire financial implosion could cause a fiduciary to have responsibility to act. We need something better to separate the wheat from the chaff. And the Court uses a much better analogy. But essentially how do we do that; meritorious claims versus nonmeritorious claims.

And it's true that merely -- I don't disagree with what the Court -- I might not have used the same words, but surely there does need to have special

circumstances for a fiduciary of a publicly traded company to remove company stock as a 401(k) plan option. If I may just read quickly from Dudenhoeffer in the section where they start to discuss the nonpublic information claim which is the larger part of the claim in this case.

THE COURT: You're saying the nonpublic information is the larger part of the claim in your case?

MR. CIOLKO: I'm sorry, the public information.

THE COURT: Okay, because I didn't read your complaint that way.

MR. CIOLKO: I was still getting my notes out of my head from Mr. Tetrick, sorry. Justice Breyer who started off -- just for full disclosure, Fifth Third Dudenhoeffer case was our firm's case, and I did a fair amount of the briefing all the way up when I second chaired the argument. So you could feel the tension back and forth on certain issues. Justice Breyer was quite clear that in one of our special circumstances where fiduciaries are being presented with public material again and again and again that would show the almost inevitable decline of value in the stock but just ignore it and take no action, you have a claim in and of itself.

In the decision itself, the Court does say: In our view where a stock is publicly traded allegations that a fiduciary should have recognized from publicly available

information alone that the market was over or undervaluing the stock are implausible as a general rule at least in the absence of special circumstances.

And it goes on, In other words, a fiduciary usually is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it that is available to him. Which is essentially the primary argument defendants make if there is a publicly traded price, there cannot be a claim for imprudence for holding that investment of company stock.

THE COURT: Well, I think what the defendants say is if there is a publicly available price there cannot be such a claim absent special circumstances indicating that the market is not reflecting that information.

MR. CIOLKO: That's true. Your Honor, I would only disagree as to the fact that there's two different sections, one is in absence of special circumstances. Then later in the decision it gives an example of what would be a special circumstances which is something -- which are events that would make a particular market inefficient or in an appropriate measure. That's just one special circumstance.

THE COURT: And what is the example that you believe the Supreme Court offers?

MR. CIOLKO: I believe the Supreme Court does

offer one example, not exclusive.

THE COURT: And what is that?

MR. CIOLKO: That is if a plaintiff were to prove that a market were insufficiently efficient or did not take in all relevant information or was not a reliable indicator of the value of stock of a share of stock of a publicly traded company, it's possible that a plaintiff would bring a public information claim, but that's not the exclusive special circumstance, that's one example. I'll get into why I think some of the things that we've talked about are special examples.

If I may, the Court in my previous quote that ended in essentially the best estimate of the value of the stocks traded on it is that a fiduciary is not imprudent to rely on a price of stock -- on a stock's price, I apologize. And it cites to a very famous ERISA case written by Judge Posner in the Seventh Circuit, Summers versus State Street. If you go to the very point, the very citation at Summers, if you bear with me for a second. This is another ERISA company stock case. The Court states, Thus at every point in the long slide of United stock price, that price was the best estimate available, it is to State Street or the UAL committee of a company's value. So neither fiduciary was required to act on the assumption that the market was overvaluing United. So

Justice Breyer is taking directly Judge Posner's statement to support beginning of the special circumstances discussion. Then Justice Posner goes on, What is true however is that the fall in the market price of United Airlines there was increasing the risk borne by the owners of the stock, the participants in ESOP. There's always risk in the sense of variance of returns to owning common stock because the fortunes of a company are uncertain and stock holders, unlike bond holders and other owners of the companies debt, do not have fixed entitlement. Some companies however are risker than others. Of particular relevance to this case, the higher the ratio of fixed interest debt to equity is the riskier the position of the equity holders common holders are.

Essentially, Judge Posner is saying there are circumstances where there's a publicly traded company and it trades at a certain price, but it has been falling precipitously, and for irreversible reasons having to do with the economy, the particular industry that the company is involved in. If there's a high enough debt equity ratio in other words, this investment is no long an appropriate investment for this vehicle. And I think what's not discussed because it wasn't really a point of discussion except for one line in the Dudenhoeffer cases, all of these cases, ERISA is based in trust law and what dictates the

administrators of a plan is the purpose of the plan. The purpose of this plan, if you'll read the investment policy statement, is to aid in the long term retirement savings of its participants.

So I think I would just like to speak more plainly than I have. In some ways Polaroid was a sadder story than Peabody. And in some ways Peabody is a much worse case. In Polaroid, which I was also involved in that case, there was a chance along the way for the company to divest and diversify into different technologies; it decided not to, and it paid the price for hanging on to a technology that was beloved but out of date. When you are a mining company, a coal mining company that's essentially permanently being overtaken by natural gas in both supply and price, when coal companies are being divested by sovereign wealth funds, the largest in the world, by CalSTRS and CalPERS in the State of California, when the press covering it is essentially saying coal as we know it is dead, along with U.S. Government making regulations making it more and more expensive to dig up coal which is deeper and deeper. That is a much -- that is a much harder case for a company to come back from. There's no -- there's so much invested in this one product -- there's two types of coal -- but there is no chance like Polaroid had to diversify its intellectual portfolio into other

products. There's holes in the ground, big holes in the ground where they get coal, and some of the biggest buyers in China and India are going to Indonesia, or in their own countries and producing their own coal. What I'm saying is, when you have a 99 percent drop in the class period, when you have an Alt-Z score which takes fundamentals in a unique way but a way that's been blessed by financial and analytical professionals across the board as well as D.C. Circuit as an excellent indicator of potential bankruptcy, when you have a company, Patriot Coal, that you spun off in 2007 twice filed for bankruptcy for the same reasons, you know, declining sales, increased costs ending of high priced contracts, natural gas overtaking in volume and in price the place in the electrical grid and forecast that that's not going to end in the foreseeable future, and two other coal companies, Arch Coal and Walter Energy also filing for bankruptcy, Arch Coal and Patriot Coal also before they filed for bankruptcy hired an independent fiduciary, looked at their company stock fund, and sold the shares. At some point along the line when a company such as this is falling and there's no end in sight, and it's sad because the company had lost 31,000 employees since 2009, it lost 20 or 30 billion dollars in market capital, if this isn't the case where the fiduciaries of a plan should have taken some action to protect their workers who

were losing their jobs by simply removing the company stock investment, I don't know what is.

THE COURT: So -- but your complaint posits that that action should have been taken in December of 2014, right?

MR. CIOLKO: December of 2012.

THE COURT: 2012, excuse me. So what is it about December of 2012 that makes that the moment when a fiduciary should know that this is when it's got to happen?

MR. CIOLKO: That's a good question, Your Honor, and if we get a chance to go through discovery the dates may change because internal documents may show a year here, six months there, but to us we were conservative. There were certainly red flags that went back as far as 2009, and 10, and 11, and 12 for the problems that the coal industry were having. In 2001 when the company went public, President Bush was pushing coal as the big new -- not new, the old is new energy source and climate control was not really at a forefront as it is now.

THE COURT: And there is certainly the possibility that in the United States someone who could be elected who is not terribly concerned about or believes in global warming and could create a regulatory environment that is much more hospitable to coal, correct? Can you envision such a possibility?

MR. CIOLKO: Your Honor, I envisioned this question and it's a good one. But what the President-elect cannot do is roll back every regulation. What the President-elect cannot do is stop the natural gas industry from continuing to dominate. What the President-elect can't do is stop China from completing their infrastructure and using their own mines and cheaper coal from Indonesia. There's some things they can do, but all this is -- and this is just -- it's an interesting question, interesting talk, but it almost doesn't matter because a fiduciary has to look at the circumstances as they exist at that time. And you could argue, a fiduciary even as recently as year ago if they were to prognosticate who would be in the White House a year from now may not have thought that it was the most likely to be President-elect, and hopefully he does very well. But you have to judge the propriety of investing in company stock during those circumstances.

It's interesting the most indepth discussions that you see in cases before and after Dudenhoeffer with regards to divestment of company stock, employer stock and 401(k) plans are usually found when a company actually takes action to divest company stock and then they get sued by the employees who want to keep it in. In the Tatum case which has been up and down in the Fourth Circuit has gone deep into the case towards trial, you'll see that the

experts and the courts say you have to look at the totality of the circumstances including the changing risk to the company. This is a completely different company now that has gone bankrupt. It's almost -- what troubles me the most -- and my colleagues are going to say you forget to hit the three biggest things -- but what troubles me the most is what I truly believe is that we filed this suit belatedly after all of its major competitors either filed for bankruptcy and/or got their own independent fiduciary and got rid of imprudent stock; they did it here. It's very clear from February 26, 2016, Gallagher informed participants by letter that it had decided to freeze and subsequently eliminate the Peabody stock fund as an investment option in its plan. Gallagher concluded that maintaining the stock fund as an investment option is no longer consistent with the fiduciary responsibility provisions of ERISA. Gallagher further stated that its decision simply reflects its judgment as a fiduciary, that it is in the interest of the plan's participants to eliminate their exposure within the plans through the stock fund to the risks facing the company in Peabody stock. Do my colleagues and their company disagree with that? How is it possible for an IF to come to that conclusion? It's not challenged by anyone, and it's used more and more because a lot of the fiduciaries in this plan, or CEOs, CFOs, CIOs --

and not to cast any aspersions, you are inherently conflicted. There was a lot of arguments made at the Supreme Court, you know, you don't want to send any bad signals by selling the stock, it will get even worse. And we can put that aside. For a company like this, you could have stock price of one day and you know the stock price is going to be lower the next day and the next day because you know what the financials look like and what the news is going to look like.

When they finally divested the stock here, there was no reaction, no appreciable reaction by the stock market. And these other companies, Patriot Coal and Arch Coal when they divested, they divested for all the same reasons over all the same years, over industry collapse and the rise of natural gas and supply of natural gas, and the climate control worries around the world that were limiting significant huge institutional holders of coal stock, therefore limiting the ability for the company to raise money, so they had to do it through debt. And we do have lovely charts. If you see the chart, besides the Z-Altman chart, on the flip side you see the debt equity ratio.

THE COURT: But isn't the Alt-Z score and the debt equity ratio, aren't those public pieces of information that the market is digesting?

MR. CIOLKO: Yes, it is, Your Honor. It's

digesting, but for this plan, the fiduciaries -- this isn't like a Schwab account. These fiduciaries have a responsibility, have a responsibility to put the people in the best position to save for retirement over time. While this stock is at five year, as Judge Posner said if it continues to decrease and the debt continues to increase you are at a higher risk of bankruptcy, of your stock being worth nothing. It simply can't be that any publicly traded investment vehicle, any one, pick one, in any plan can never be found an imprudent investment because it's publicly traded. That goes against cases that we cite, it goes against common sense, that cannot be what the Supreme Court wanted. I mean think about that. If you have a poor performing mutual fund, but it's publicly traded and you know what the price is and you have an investment policy statement which every company has to have, every publicly traded company that has a 401(k) plan, and it says we'll monitor the investments for imprudence. Well, what does that mean? If something has a publicly traded price then can it be a sale? Supreme Court in Tibble made it pretty clear that plan fiduciaries have a constant duty to monitor investments and change them if something were cheaper or became a better alternative. There's cases in defined benefit pension cases or if the portfolio of investments aren't diversified enough, that's a violation of the

fiduciary duty.

THE COURT: But that is not a requirement within ESOP, and indeed the statutory framework specifically recognizes that there is no obligation --

MR. CIOLKO: I'm sorry, I was just giving an example of -- an extreme example of it can't be that price alone eliminates fiduciary responsibility.

THE COURT: I understand, but we are dealing with a more unique environment when we are dealing with an ESOP.

MR. CIOLKO: Here is one other thing that I think some courts confuse about ESOPS. This isn't a pure ESOP. There's other investment alternatives in the plan. Some companies choose to call the stock fund, which is one of a number of investments, an ESOP. What that means is probably there's some tax advantages to calling it that for the provider, but what it really is is an investment, one investment of many in a menu chosen, selected, and monitored by the defendant's fiduciaries. It's hard for me to get past that other coal companies while maybe not as quick as they should, realized that there was an issue here, realized that the patient was dying in the words of Judge Posner, and did at least something. And of course you can freeze a stock, freeze further purchase of a stock, that's completely within the fiduciary's discretion, and

even if individuals might not want that, they're fiduciaries, they have responsibility to the entire plan. The Honeywell judge in one of the seminal ERISA company stock decisions say why would you throw good money after bad. And this disclosure, talking about the nonpublic part of our case, this was discussed at the Supreme Court as well, and it made very clear that an 8(k) disclosure of material information can be done within weeks, if not sooner. This isn't some huge undertaking. Everything is electronic now, everything is filed, and people will see it. And we did prove that if we -- and I'm skipping to the nonpublic because I'm not sure how much time I have.

THE COURT: And a fiduciary would have to try and assess whether freezing further purchases of that stock and making that public disclosure would do more harm to the stockholdings in the plan already than good, right?

MR. CIOLKO: That's exactly right, Your Honor, and that's exactly what the independent fiduciary did in this case. The fiduciaries could have done it themselves. Now, they hired independent fiduciary to have a fresh set of eyes. I think one of the most interesting avenues of discovery here will be the process by which the third party administrator was hired and their process analyzing of why this is no longer a prudent stock. Yes, and I think we've alleged that when this stock was sold it had no bad effects

on the stock price as a whole, there was no real effect. And that's the real concern. Amgen at the Supreme Court in the Ninth Circuit, is a disclosure of material fact would cause more harm than good is divestment of a large piece of company stock from the company's own plan going to send a message to the country that, well, if they're divesting it we should all divest. But that's all based on public and nonpublic information that becomes public. To me, and I have an MBA, one of things that we were taught is you get out of a bad investment as quickly as you can. And if a stock is artificially inflated over a period of time, the longer that's inflated the harder that fall is going to be.

THE COURT: And what do you allege in this complaint suggests that the stock price here was artificially inflated?

MR. CIOLKO: We suggest that for four years in their 11(k) Peabody specifically said that they are unable to prognosticate what effects ill or not of regulatory changes having to do with climate change or regulatory modifications that the United States Government might do. They set it for four years and then it turns out that they indeed modeled a number of different scenarios internally what would happen if they put a coal tax on for 40 dollars a ton, what would happen if there was a restriction on the

type of coal emitting clean -- how much would it cost to refit certain number of refineries. They did it, and they violated the Martin Act in the New York AG's mind. And why there wasn't a 10(b) securities case not filed, I'm not sure. The other side of my partners and the Plaintiff's bar is pretty good about that, and it could be that this stock was continually going down.

THE COURT: Clearly you're not suggesting that the public wasn't generally aware of the change in the regulatory environment with respect to climate change and clean coal, and, I mean, there was -- even I knew about that during the time period.

MR. CIOLKO: It's the timing of it, Your Honor. A lot of those regulations came into effect in 13, 14, 15, and they were being discussed in 2010 and 2011 at the UN. But they've been trying to have -- it took 15 years to get --

THE COURT: And how can they know, given that it's taken 15 years for it to happen, how can they know that it's going to happen at all?

MR. CIOLKO: I think by the point in -- I think the point was that they are saying that we cannot -- that we are unable to figure out under different scenarios what would happen if this regulation were taking place or what have you. And there was regulations out there, and the

truth was that they were able and in fact did run different tests and scenarios to see what the effect on operations and the profits of the company.

THE COURT: When is it that those scenarios were run that should have given them -- I mean, I assume that your claim is that once they ran those scenarios that they should have disclosed the possible risk of those scenarios in their next public filings?

THE DEFENDANT: Yes, Your Honor, and the results of those.

THE COURT: When was that?

MR. CIOLKO: I don't have that in front of me. We don't know the full number of tests, but I believe it was 2013 and 2011, throughout the class periods. I mean, I think why the New York's AG went after the company is because, you know, high level executives of the company even as late as 2013 or 14 are telling people that climate change is this modeled, you know, hysteria; in other words trying to tell their investors that you shouldn't worry so much about how it's going to affect us. And the fact that he's saying this in the face of some very public things I think really just makes the admission of the fact that we have run a number of tests and a number of them came out with negative consequences, we will continue to do so and update, I would think that would be immaterial to

investors.

THE COURT: And what is your response to the defendants' arguments that you can't demonstrate that it had any impact on the price?

MR. CIOLKO: Well, I think my colleague did admit that after an initial blip, and I think this is the question Your Honor was asking Mr. Tetrick, well, this comes out and they figure maybe the first reaction is okay they didn't pay a fine so it's not going to immediately affect the company. Or just sometimes when an investigation is over there is an uptick and announced that there's an agreement that we will not make these statements in the future and then the investigation's over. So you'll get a slight uptick of maybe automatic buyers, institutional buyers. But then over the next week there was a decrease, I believe between four and eight percent of the stock price. What you have to remember, Your Honor, and I think Mr. Tetrick did a very good job of saying, look, this stock was slowly and steadily moving. Well, maybe it would have been a little bit steeper and stronger.

THE COURT: Well, does your evidence suggest that after that disclosure the trend was indeed steeper?

MR. CIOLKO: I believe our allegations were in the immediate week or two afterwards, there was a material decrease in the price of the stock.

THE COURT: And do you believe that that materiality is something that I can assess at this stage of the case?

MR. CIOLKO: I think to be perfectly honest, I think there are cases where you could be able to. I think what we would need is a bit more discovery. This isn't a securities case so a bit more discovery about what was going on in that investigation, what else was put out, what other news or nonnews were put out during that time period. We believe eight percent in and of itself without a counterexplanation, I think the defendants said there was other news or other things that could have affected it. I think both sides would benefit from looking at that more closely.

I think Your Honor's -- our firm has done these cases for 15 years. And this particular question, I'm going back to the public information question, is a very important one for a very small subset of cases for companies that are in dire straights, that are careening into bankruptcy whether because of fraud or because the industry has just passed them by.

THE COURT: Now, I gather from your brief and correct me if I'm misunderstanding it, that you believe that there can be a public information claim separate and apart from any special circumstances, public information

with special circumstances claim.

MR. CIOLKO: Your Honor --

THE COURT: I mean, I got the sense that you were arguing that those two were divorced, that there's just this public information claim and then we've got our public information with special circumstances.

MR. CIOLKO: What I was really trying to do, we were trying to do, is weave in the good decisions that we've gotten in these very specific cases that are much like this case here, not like BP where the company went on and in 10 years they'll be in the huge black again, or even Fifth Third, which was the Dudenhoeffer case, was not a company that was facing a dire bankruptcy like cases. Because this question is so new, and I apologize to the Court because this is my own personal doing, whether like we're saying like the Altman-Z score, which not everybody understands, which might not be completely public, the high debt to equity ratio, the combination of things, whether they all come together as a special circumstance or you read them as a public information claim of its own, Kodak's laid out, I believe, and I think I believe in a very short opinion the LandAmerica case thought of itself not as exactly a special situation, but it really was. I would like the Court to think of this as our allegations with regard to the plain public information case is a special

circumstance in and of itself, everything that's made up within that is a special circumstance.

THE COURT: I'm sorry, I lost you there.

MR. CIOLKO: All the allegations we made, I think, with regards to whether the public information case is a viable one, whether you call it a separate public information case, which is viable for X, Y and Z reasons, or it's a public information case that is supported by those things in other special circumstances we listed in the Court. I think the combination of those factors creates a special circumstance singular for the Court where in this case a fiduciary should have acted. And to us, we look at this and say the company you just spin off went bankrupt twice and sold their company stock, one of your prime competitors did the same thing, yet you waited until we sued you, we believe, to go out and hire independent fiduciary. How is it okay for an independent fiduciary to look at public information and say this is just not prudent given these totality of circumstances? The same test that the Tatum court for divestment of employer securities.

So how can you read Dudenhoeffer as saying that that's appropriate and it would be imprudent according to this independent fiduciary to continue to invest the company stock, but members of this same class are hurt can't bring their claim? That would seem to be an

impossible reading application of Dudenhoeffer. And I think the Dudenhoeffer Court, which was focused mainly on getting rid of the presumption of prudence, and also having to deal with -- there's two types of ERISA cases, and there really hadn't been an ERISA case of this type in four or five years and that wasn't even directly on point.

THE COURT: Well, the defendants identified what they characterized as the four main special circumstances that the plaintiffs have identified in their complaint; do you agree with that characterization?

MR. CIOLKO: I'd have to have them read back to me. I imagine one was the Alt-Z score.

THE COURT: One was the Alt-Z score and the debt level, the failure to investigate.

MR. CIOLKO: Correct.

THE COURT: And then the nonpublic information. Are those -- I mean, tell me what you believe the special circumstances are that I should be evaluating.

MR. CIOLKO: Those, especially the first three, and the special circumstances aren't just those three indicators. The special circumstances are those indicators within what's happening to the company and the broader industry. In other words, a special circumstance could be what Justice Breyer said, which is one of our special circumstances, which is the fiduciaries of a company who

also happen to be executives as here, just ignored tons and tons of negative information from every analyst that covered their company and the industry, they just ignored them and took no action. That in and of itself, as Justice Breyer said, I would think that's easily a claim. That's one of our special circumstances, our claim is. And again, we don't have access to all the documents that the defendants do with regards to the fiduciary process. What we can glean from their SEC filings and other documents there was nothing done to evaluate this claim until after they received the lawsuit.

THE COURT: So you don't think that that claim is derivative of your public/nonpublic information claims? That's one of the arguments that the defendants make. That you're going to have to make out your claim under your public or nonpublic information claim, and that any failure to monitor is derivative of that.

MR. CIOLKO: Failure to monitor other fiduciaries is its own claim and may be derivative of the actions from other claims, which is a separate claim in our case. But, no, I think the failure to take any action, the failure to investigate regularly is in and of itself a breach of procedural prudence. And a breach of procedural prudence can in and of itself lead to a finding of fiduciary liability if there is causation and harm from the lack of

attention. Now, there's procedural imprudence, if this were a company that dropped ten dollars and then came up five dollars and we made the same claim that you didn't look at the company's stock, that may be true, but there would be no harm and no liability. Here we think that there was complete, that there was complete inaction so the procedures that are outlined by DOL regulations and are enshrined in the statute weren't followed until they got sued, so the procedural violation which is a separate claim of procedural imprudence, you didn't do your job, you didn't look at these investments in regular meetings.

THE COURT: All right. I'm going to ask you to wrap it up in the next two or three minutes and then I still have a few questions for you because we're about out of time.

MR. CIOLKO: Sure. Bear with me for one second.

THE COURT: All right.

MR. CIOLKO: I'm sure I left out a fair amount, Your Honor, but the briefs from both sides I think are well done and lay out the arguments, so I'd be happy to answer any more questions the Court has.

THE COURT: Talk to me about the basis for these plaintiffs to assert claims under the Big Ridge and the Peabody Western plans.

MR. CIOLKO: Sure, Your Honor. There's a line of case law starting with the Four Bush case in the Fifth Circuit that make it clear that a plaintiff who is in one plan can bring a claim for investment imprudence for particular investment in that plan that's also in other plans sponsored by that same employer; in other words, in our Marc case, Judge Chesler found that we had participated in one of three Marc-Plans, but because the same investment, the company stock plan, and the same rules applied with regards to investments across the board, our plaintiff not just still had standing as a class representative but also had standing to sue the company on their behalf because they were all clients in the same place that were hurt by the same conduct by the same people. Here, not just do you have -- you have the three main plans, and I'll note that the Big Ridge Plan was merged into the larger PIC Plan during the class period, so I would think that solves some of Mr. Tetrick's questions.

You have the same issue here is the provision of company stock as an investment, the claims are the same, the ultimate defendants are the same or largely overlapping, and more telling is the company itself merged all the company stock fund investments from the three plans into one trust. This is a master trust for all three plans for company stocks holdings. So it doesn't matter if a

participant from any of these plans invested in Peabody stock, it all wound up in the same trust run by the same trustee. So they were intermingled and whatever harms were caused to the value of those shares -- and that was the decision made by the fiduciaries of the plans, so I don't really see practically speaking how out clients wouldn't have standing for the two smaller plans. They were essentially all mixed together by the defendants and defendants' plans by their own actions.

THE COURT: So let me make sure I am understanding what you are saying. Let's look at December of 2012. Are you asserting that the price of the company stock at that point in time was inflated?

MR. CIOLKO: It was inflated or artificially maintained by information not provided to the plan participants.

THE COURT: What?

MR. CIOLKO: The information in the 10(k) the misinformation in the 10(k) that the company was not able to prognosticate the effects of any regulatory changes.

THE COURT: What else?

MR. CIOLKO: That's it, Your Honor.

THE COURT: So that is the only factor that the Plaintiffs are pointing to that alleges an artificial inflation of the stock?

MR. CIOLKO: Yes, Your Honor. I'm not saying that discovery won't broaden that, but that's to me a pretty big material fact.

THE COURT: I understand. I just want to understand what the argument is because the sense I get when I read the complaint is that based upon all of the public information any prudent fiduciary should have known based on the public information in December of 2012, that that was an unreasonably risky investment for a prudent fiduciary to continue to maintain in the plan.

MR. CIOLKO: Yes, Your Honor.

THE COURT: And that that continued in January of 2013, and June of 2013, and as the stock continued to go down that based on the public information and the changing economic environment in which Peabody and other coal companies were functioning, that it simply became an imprudent investment.

MR. CIOLKO: That's true, Your Honor, as well as their other -- the other major coal companies in the country experiencing the same thing and doing what --

THE COURT: But that just provides evidence of that position, right? Other coal companies are experiencing the same thing.

MR. CIOLKO: Well, that's right. And then Peabody had a few extra things. They had made a huge

purchase in an Australia mining company that turned out to be a huge debt burden on their shoulders. I think that even compared to the coal index, the Peabody stock underperformed the coal index which obviously did not perform well during this time and S&P 500 had steadily improving. And the way you measure damages you take the money invested investment alternative and how much that would have made in an alternative investment and that's how you figure out ERISA damages.

And I would say the Alt-Z score which is not something that your everyday person would know about, it wasn't just under -- and they use a lot of different metrics combining numerical ratios taken from financials -- it wasn't just right below the part where there's a scare that the company will go bankrupt. By the middle of the class period it's essentially like Def-Con 4 warning, like this company is in dire danger. This is basically a call to institutional investors to get rid of the stock.

THE COURT: But that's public information, right?

MR. CIOLKO: Correct.

THE COURT: And any institutional investor especially looking at a company in this industry would be aware of that.

MR. CIOLKO: Right, and take action and divest.

THE COURT: And one assumes that with that being

public information that the market has also taken that into account?

MR. CIOLKO: It has, Your Honor, but a market price on one day reflects one day. What you need to do, I think, look at a market price over time and the totality of circumstances over time, which is what the Tatum Court did, and say at some point there reaches, okay, this is worth two dollars but in two weeks you're going to have a stock that's worth five dollars, and given whether its Altman-Z score or projected earnings, it could be either -- in five years it could be either six dollars or four dollars just generally moving around. Here you have stock that maybe it's worth five dollars today. There's a five percent chance that maybe in four or five years it gets back up to 10 or 15, but there's a 90 percent chance it goes to zero. That is a different situation. That's what I think what Judge Posner -- I think Judge Breyer purposely cited to that portion of Judge Posner's decision in Summers to give folks at least an idea of where to go to look for special circumstances.

So to me it's when you're citing that case for the proposition that the price is the price, and the next three paragraphs go on to say, well, the price is the price but you have to look at what's going into the price and what's going into the risk, like, not every five dollar

stocks are made the same. And I want to reiterate, taken to its greatest extent, if the Court were to take in Mr. Tetrick's view, admitted view I think, any publicly traded vehicle, if it's publicly traded, cannot be found to be an imprudent investment for a 401(k) plan.

THE COURT: Okay. I'm out of time for you.

MR. CIOLKO: Especially remember the purpose of the plan.

THE COURT: All right. Give you five minutes to respond.

MR. TETRICK: Thank you, Your Honor, and I don't think I'll need the entire five minutes unless the Court has additional questions.

I've heard a lot of discussion over the last few minutes about what the Supreme Court must have meant or should have meant or should have said in the Dudenhoeffer case. And I would remind the Court that four courts of appeals have taken up the Dudenhoeffer standard under special circumstances test. And in all four of those cases the courts of appeals have determined that the plaintiffs did not make out special circumstances. The BP case out of Fifth Circuit. The Lehman case, which is known as Rinehart in the Second Circuit. The GM case, which is known as Pfeil P-F-E-I-L in the Sixth Circuit. And the Smith case, which is Delta Airlines in Eleventh Circuit. The

last two that I mentioned, the GM and the Delta case are particularly instructive here because they both involve companies where there was speculation on the front page of the Wall Street Journal for a very long time before they filed for bankruptcy, before they eventually filed for bankruptcy. It wasn't a sudden implosion like we saw in Lehman for example.

In the Eleventh Circuit case, the Smith case, the Eleventh Circuit accurately said that the crux of the plaintiffs' prudence claim is that the Delta fiduciaries should have foreseen that Delta stock would continue to decline.

The danger of these claims as recognized by the Supreme Court is that you risk putting these fiduciaries in a position of trying to outsmart the market. The Tatum case out of the Fourth Circuit that we just talked about or my colleague just spoke about is an example of that danger. That involved a situation where the fiduciaries chose to divest a plan of company stock only to see it recover and then get sued as a result.

The Supreme Court has set a high standard here both under the special circumstances for public information claims and under the nonpublic information claims. The plaintiffs' counsel have established that they are very well experienced. They've handled a lot of these cases.

They know what they're doing. The Court can take some solace in the fact that a very tough test has been met by some very good lawyers on the plaintiffs' case, on the plaintiffs' side, and this complaint simply fell short. This Court should follow the example of the four courts of appeals that have taken up these types of claims and apply Dudenhoeffer for what it says as opposed to what the plaintiffs say it must mean.

And unless the Court has any additional questions, I would thank the Court for its time and attention and ask that it dismiss the second amended complaint.

THE COURT: All right. Thank you. Fine job by both sides. And we will take the matter under submission.

(COURT ADJOURNED AT APPROXIMATELY 12:09 P.M.)

REPORTER'S CERTIFICATE

I, Patti Dunn Wecke, Registered Merit Reporter, hereby certify that I am a duly appointed official court reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the entitled cause, and a true and correct transcription of my stenographic notes.

I further certify that this transcript, containing pages 1 - 55 inclusive, was delivered electronically and that this reporter takes no responsibility for missing or altered pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 13th day of December, 2016.

/s/Patti Dunn Wecke, RMR, CRR, CMRS
Official Reporter